BEFORE THE ENVIRONMENTAL APPEALS BOARD

LEWES BOARD OF PUBLIC WORKS,	)	
Appellant,	)	
v.	)	**EAB Appeal No. 2020-05**
DELAWARE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL,	)	
Appellee.	)	

DELAWARE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL'S RESPONSE TO APPELLANT'S MOTION FOR SUMMARY JUDGMENT

Defendant Delaware Department of Natural Resources and Environmental Control ("DNREC") hereby responds to Appellant's motion for summary judgment:

In October 2019, Jerry Peter, through his contractor, submitted two applications for permit to construct a well - geothermal potable supply and geothermal non-potable recharge. The Water Supply Section ("WSS") requested approval from the Lewes Board of Public Works ("BPW"). BPW opposed the applications, and accordingly, the potable well application was denied. Mr. Peter appealed this decision to the Environmental Appeals Board ("EAB"). Upon review of the statute and regulations by counsel, WSS revoked the denial and issued the permits on April 7, 2020. Shortly after the permits were issued, BPW appealed to the EAB. The

parties submitted joint stipulated facts followed by cross-motions for summary judgment.

Appellant argues DNREC's decision to grant the two well permits at issue should be reversed for three reasons: 1) no written approval from BPW was submitted pursuant to 7 *Del. Admin. C* § 7301-3.12.7, 2) BPW's Charter requires Mr. Peter to receive public water, and 3) BPW has made sewer service contingent on water service and without sewer service, DNREC cannot issue a well permit. Each of these arguments ignores the controlling statute, 7 *Del. C* § 6075(a), under which DNREC has no discretion to deny the permits at issue.

7 *Del. C* § 6075(a) requires DNREC to issue a well permit unless one of three exceptions applies: 1) the ground water supply is inadequate or unsuitable for the intended use, 2) the water utility demonstrates that it can provide service of equal or better quality at lower cost, or 3) the permit applicant is a resident of a municipality, a county water district authority, or a recorded development where public water is available. By the plain language of the statute, DNREC has no discretion to deny a permit unless one of the exceptions applies.

The following facts are undisputed: Neither of the first two exceptions apply to this circumstance, and Mr. Peter's property is within the CPCN of Lewes BPW, but not within the city limits of Lewes. Accordingly, Mr. Peter is not a resident of a municipality, county water district authority, or recorded development where public

water is available. Therefore, the proposed well does not fall within any of the exceptions of 7 *Del. C* § 6075(a) and DNREC has no discretion whether to grant the permit or not.

This case essentially turns on fundamental principles of statutory and regulatory interpretation, and the hierarchy of acts of the General Assembly, agency rulemaking, and resolutions by municipal entities. The goal of statutory interpretation is to "ascertain and give effect to the intent of the legislature."[1] Where the statute's plain language is clear and unambiguous, that plain meaning controls. Each of Appellant's arguments invoke, but also misconstrue, a regulation or ordinance. Where a regulation and statute conflict, however, the statute controls and any additional restrictions imposed by a regulation are invalid.[2] Where an agency is under a state statutory obligation, a municipality may not enact stricter requirements that hinder the agency.[3] Each of Appellant's arguments fails because 7 *Del. C* § 6075(a) controls.

First, Appellant argues the Regulations Governing the Construction and Use of Wells appear to impose additional obligations on an applicant. WSS initially understood these additional obligations to control and denied the permits pursuant to 7 *Del. Admin. C* § 7301-3.12.7 as Lewes BPW did not approve the application. Here,

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[1] *Ingram v. Thorpe*, 747 A.2d 545, 547 (2000).
[2] *Cantinca v. Fontana*, 884 A.2d 468, 473 (Del. 2005).
[3] *City of Lewes v. Nepa*, 212 A.3d 270, 279 (Del. 2019).

however, the additional restriction requiring a written statement of approval is not applicable for an applicant who does not fall under one of the exceptions to 7 *Del. C* § 6075(a) because this requirement conflicts with the plain language of the statute, which imposes a mandatory duty on DNREC.

Next, Appellant argues BPW's Charter requires Mr. Peter to receive water service. Section 4.12.2 of BPW's Charter states, in pertinent part, "The BPW shall have the authority to require any or all premises within the corporate limits of the City or service area, to be and to remain connected to the municipal utility systems. As an initial matter, DNREC disagrees with BPW's reading of this section as requiring an applicant to receive water service. The plain text of the section only grants BPW the authority to require the property to be and remain connected. The section imposes no use requirement or authority for such.

Additionally, even if BPW's Charter provided BPW the authority to require a property to use its utility services, this provision would not in any way modify DNREC's obligations under 7 *Del. C* § 6075(a). "Statutes on the same subject must be construed together so that effect is given to every provision unless there is an irreconcilable conflict between the statutes."[4] BPW's Charter and 7 *Del. C* § 6075(a) can be read harmoniously as one imposes an obligation on DNREC while the other authorizes BPW certain control over its service area. Accordingly, the relevant

[4] *State, Dep't of Labor v. Minner*, 448 A.2d 227, 229 (Del. 1982).

sections of BPW's Charter do not override the obligation imposed on DNREC to issue the permits.

Lastly, Appellant argues, "Well Permit Regulations 3.5.7 and 3.12.4 together create a Catch-22 for the Applicant: he either refuses to accept water and sewer from the BPW, thereby foreclosing DNREC's ability to review his well permit applications pursuant to 3.5.7, or he agrees to accept both water and sewer from the BPW, and therefore creates a basis for denying his permit because public water is available." Again, Appellant misinterprets the regulations. First, 3.5.7 states DNREC will not consider a potable supply well unless "central sewer service is available to the parcel." "Available" is defined within the regulations as a "service connection exists within 200 feet of the foundation of the structure or building." It is undisputed that sewer service connection is available to the property. This section imposes no requirement for a physical connection to the sewer service, nor actual use of the sewer service. Additionally, even assuming BPW's Resolution 13-004 would require Mr. Peter to accept both water and sewer service, this ordinance does not invalidate or modify DNREC's obligation under 7 *Del. C* § 6075(a). Mr. Peter would still not be "a resident of a municipality, a county water district authority, or a recorded development where public water is available."

WHEREFORE, DNREC respectfully requests that the Board deny Appellant's Motion for Summary Judgment and affirm the Secretary's Decision to issue Well Permits 267708 and 267709.

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

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September 15, 2020